



In the Matter of

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,**

ARB CASE NO. 99-104

ALJ CASE NO. 98-OFC-8

PLAINTIFF,

DATE: March 21, 2002

v.

GOYA DE PUERTO RICO, INC.,

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:

Nancee Adams-Taylor, Esq., *U.S. Department of Labor, Washington, DC*

For the Defendant:

Nelson Robles Diaz, Esq., Carmen Munoz-Noya, Esq., *Lespier & Munoz-Noya, San Juan, Puerto Rico*, Jose Luis Gonzalez Castaner, Esq., *Gonzalez Castaner, Morales & Guzman, Hato Rey, Puerto Rico*

FINAL DECISION AND ORDER

The Office of Federal Contract Compliance Programs (OFCCP) filed an administrative complaint against Goya de Puerto Rico (Goya) on May 1, 1998, alleging that Goya violated its obligations as a federal contractor under Executive Order No. 11246^{1/} (the Executive Order), the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA)^{2/}, Section 503 of the

^{1/} 30 Fed. Reg. 12319 (1965), as amended by Executive Orders No. 11375 and 12086, 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978), respectively.

^{2/} Codified as amended at 38 U.S.C. §4212

Rehabilitation Act of 1973^{3/} (Section 503) (collectively, “the three laws”), and their implementing regulations (41 C.F.R. Parts 60-1 to 60-60, 41 C.F.R. Part 60-250, and 41 C.F.R. Part 60-741 (1997) respectively).^{4/} The Executive Order, VEVRAA, and Section 503, and their implementing regulations require that every contractor who employs at least 50 employees and has a contract of \$50,000 or more with the federal government prepare and maintain a written affirmative action program (AAP). 41 C.F.R. §§60-1.40; 60-250.5; 60-741.40 (1997). OFCCP contends that Goya failed to develop and maintain written AAPs as required by the three laws and their implementing regulations. OFCCP seeks “debarment of Goya as a federal contractor, including the termination of Goya’s existing government contracts, for the longer of a minimum of six months or until Goya submits a complete AAP to OFCCP, and OFCCP has had an opportunity to complete an on-site investigation and a full compliance review and verification of Goya’s compliance.” Administrative Law Judge’s Recommended Decision and Order (R. D. & O.) at 13-14; Plaintiff’s Responses to Defendant’s Exceptions to the Administrative Law Judge’s Recommended Decision and Order at 15.

After a hearing, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order in which he rejected three of Goya’s arguments: that the administrative proceeding should be held in abeyance until the District Court ruled on Goya’s request for a permanent injunction; that the Secretary of Labor’s alleged failure to rule on Goya’s request for an exemption barred OFCCP’S action against Goya; and that Goya was not covered by the three laws because it does not have a government contract. The ALJ also found that he had no authority to rule on Goya’s arguments that the Executive Order is unconstitutional and that the Contract Disputes Act, 41 U.S.C. §§601-613 (1994 ed. Supp. V) supersedes the procedures in 41 C.F.R. Chapter 60. R. D. & O. at 8. Finally, he found that Goya had abandoned its argument that the requirement to develop and maintain an AAP violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e (1994 ed. Supp. V). R. D. & O. at 8-9. The ALJ found the sanctions requested by OFCCP to be appropriate. R. D. & O. at 14. Goya timely filed exceptions to the R. D. & O.

BACKGROUND

Goya de Puerto Rico, Inc. is a food processor and distributor and is located in Bayamon, Puerto Rico. Goya has approximately 208 employees. The Defense Commissary Agency (DeCA), a federal agency, operates two commissaries in Puerto Rico, Fort Buchanan and Roosevelt Roads, where Goya distributes food. DeCA purchases the food from Goya under two Blanket Purchase Agreements (BPAs) which have been in effect continuously since 1991. A BPA is “an open-ended type of contractual agreement.” (Hearing Transcript at 71, 73). DeCA uses a BPA in cases in which it does not know the exact quantities of goods that it will purchase. Both the Fort Buchanan and

^{3/} Codified as amended at 29 U.S.C. §793.

^{4/} The regulations implementing VEVRAA and Section 503 were amended in 1998, see 63 Fed. Reg. 59642 (1998), codified at 41 C.F.R. Parts 60-250 and 60-741 (2001). However, there were no changes in the regulatory sections relevant to this case. Compare 41 C.F.R. §§60-250.1, 60-250.2, 60-250.3, 60-250.4 and 60-250.5 (1997) with 41 C.F.R. §§60-250.1, 60-250.2, 60-250.4, 60-250.5 and 60-250.40 (2001), and compare 41 C.F.R. §§60-741.1, 60-741.2, 60-741.4, 60-741.5 and 60-741.40 (1997) with 41 C.F.R. 60-741.1, 60-741.2, 60-741.4, 60-741.5, 60-741.40 (2001).

Roosevelt BPAs contain the terms and conditions of the purchase transactions.^{5/} Since 1991, Goya has received substantially more than \$50,000 annually in payment for the goods provided to the commissaries. R. D. & O. at 3.

Goya, in a letter dated August 2, 1996, addressed to DeCA, requested “an exemption from the applicability of the Affirmative Action Programs clause from our contract.” R. D. & O. at 6. The head of a federal agency administering contracts, such as DeCA, was authorized to exempt a contractor from complying with the any requirement of the regulations if he or she determined that the contract was essential to national security and awarding the contract without the requirements of the regulations was essential to national security. 41 C.F.R. §60-1.5(c); 41 C.F.R. §60-250.3(b)(2); 41 C.F.R. §60-741.4(b)(2). The Director had the authority under each of the three laws to exempt a contractor from any part of or all of the equal opportunity clause if the Director determined that such exemption was required by special circumstances in the national interest. 41 C.F.R. §60-1.5(b)(1). Under VEVRAA, the head of a contracting agency had the authority with the concurrence of the Director, to waive the application to any contract of any part or all of the affirmative action clause when the Director deemed that special circumstances in the national interest required it. 41 C.F.R. §60-250.3(b)(1). Under Section 503, the Deputy Assistant Secretary had the authority to waive the application to any contract of the equal opportunity clause in whole or in part when he or she deemed that special circumstances in the national interest required it. 41 C.F.R. §60-741.4(b)(1).

DeCA responded to Goya’s request for an exemption in a letter dated August 19, 1996, informing Goya of the requirements for an exemption, explaining why Goya failed to qualify for an exemption, and stating that Goya should submit a request for an exemption to Patsy Christopher, the DeCA contracting officer, if Goya still wished to seek an exemption. R. D. & O. at 7. As instructed, Goya wrote to Christopher requesting an exemption on August 21, 1996, stating that “the government’s business with Goya is beneficial to the government, that it was not possible for Goya to comply with an AAP because ‘[o]ur population is 99.95% Hispanic’ and debarment of Goya would ‘mean the closing of many businesses in Puerto Rico.’” *Id.*

On September 16, 1996, Goya again wrote to Christopher stating that it had not yet received a reply to its request. *Id.* Goya claims that the DeCA Contracting Officer sent a memorandum dated September 23, 1996, to the Department of Labor conveying Goya’s request for an exemption. Goya’s Exceptions at 28. The ALJ refused to consider this DeCA memorandum because it was not entered into evidence as part of the record, but instead was attached to Goya’s reply brief filed long after the ALJ had closed the record. R. D. & O. at 7.

OFCCP filed an administrative complaint against Goya on May 1, 1998. On February 2, 1999, the day before the administrative hearing was scheduled to begin, Goya filed a complaint against the Secretary of Labor in the United States District Court for the District of Puerto Rico (Civ. No. 99-1111(PG)), seeking, *inter alia*, a temporary restraining order (TRO) and a permanent injunction prohibiting OFCCP from continuing its administrative action against Goya. R. D. & O. at 4. Goya argued that it did not have to comply with the AAP requirement because the Contract

^{5/} In September 1997 a third BPA was cancelled and rolled into the Roosevelt Roads BPA.

Disputes Act supersedes the procedures in 41 C.F.R. Chapter 60. Goya also argued that the Executive Order is unconstitutional. R. D. & O. at 4.

The District Court denied Goya's request for a TRO, and the ALJ denied Goya's motion for a stay of the administrative proceedings pending the District Court's final determination. *Id.* On September 29, 2000, the District Court issued an order granting OFCCP's request to dismiss Goya's action for an injunction, holding that Goya had not exhausted its administrative remedies. *Goya de Puerto Rico, Inc., v. Herman*, 115 F. Supp. 2d 262 (D. P. R. 2000).

JURISDICTION AND SCOPE OF REVIEW

We have jurisdiction to review the exceptions filed by the parties to the ALJ's R. D. & O. and to issue the final administrative order. 41 C.F.R. §60-30.30; 41 C.F.R. §60-250.65(b)(1); 41 C.F.R. §60-741.65(b)(1). *See also* 41 C.F.R. §60-1.26(b)(2). The ALJ's decision is a recommendation, and the Board has plenary power to determine whether the defendant has violated the Executive Order, VEVRAA, Section 503, the regulations, or the equal opportunity clauses required by the regulations to be included in each covered government contract. *See* 41 C.F.R. §60-1.4(a); 41 C.F.R. §60-250.5(a); 41 C.F.R. §60-741.5(a); 41 C.F.R. §60-30.27.

ISSUES PRESENTED

1. Whether OFCCP's failure to respond to Goya's second request for an exemption precluded OFCCP from filing the administrative complaint in this case.
2. Whether Goya has a contract with the government and accordingly is covered by the Executive Order, VEVRAA and Section 503 and their implementing regulations.
3. Whether the ALJ had authority to rule on Goya's arguments that the Contract Disputes Act supersedes the procedures in 41 C.F.R. Chapter 60.^{6/}

DISCUSSION

A. OFCCP Was Not Required to Respond to Goya's Request for an Exemption Before Filing the Administrative Complaint.

Goya requested DeCA to grant it an exemption from the AAP requirements "based on the special conditions of our firm and the type of contract we have" D (Defendant's Exhibits) 6. DeCA denied the request because Goya had not shown that a refusal to grant the exemption would "either adversely impact national security or a special national interest." D7. DeCA notified Goya

^{6/} As noted above, Goya also presented the issue whether the ALJ erred by refusing to hold the administrative hearing in abeyance until the District Court ruled on its request for an injunction. The September 29, 2000 District Court order holding that Goya had not exhausted its administrative remedies and granting OFCCP's request to dismiss Goya's action for an injunction renders this issue moot.

that it could pursue further its request for an exemption by submitting it to the contracting officer. Goya submitted the exemption request to the contracting officer as instructed. However, Goya, in support of its entitlement to the exemption, stated only that the federal government's business with Goya was beneficial to the government, that it was impossible for Goya to comply with the AAP requirement because Puerto Rico's population is 99.9% Hispanic, and that if OFCCP debarred Goya, many businesses in Puerto Rico would be closed. R. D. & O. at 7.

We agree with the ALJ that there is no provision in the three laws, their implementing regulations or the equal opportunity clauses^{7/} prohibiting or restricting OFCCP from initiating an enforcement action while a request for an exemption is pending. Furthermore, we agree with the ALJ that the second request for exemption was facially deficient. Even after DeCA apprised Goya of the requirements for obtaining a waiver, Goya made no contention that the AAP requirement would adversely affect either national security or a special national interest as the various regulations require. See discussion *supra* at 3. Finally, once OFCCP filed the administrative complaint, there was no longer any doubt that OFCCP had, in fact, denied Goya's request for an exemption. Thus, while we agree that it would have been preferable for DeCA to respond to Goya's second request for an exemption, Goya has failed to demonstrate that the failure to do so precluded OFCCP from proceeding with the administrative complaint.^{8/}

B. The BPAs under which DeCA Purchased Goods from Goya Constitute Government Contracts Requiring Goya to Prepare and Maintain an AAP Pursuant to the Executive Order, VEVRAA, Section 503 and Their Implementing Regulations.

Goya argues that it does not have any covered government contracts because it never signed the BPAs and because it was never obligated to deliver supplies in response to a DeCA order. A specific provision of the regulations, a decision of the Secretary over 18 years ago, and Goya's own characterization of the BPAs belie Goya's position.

The regulations implementing each of the contract compliance laws involved here provide that the equal opportunity clause is incorporated by operation of each law in "every contract and subcontract required by [the relevant law] and regulations . . . to include such a clause whether or not it is physically incorporated in each such contract and whether or not the contract between the

^{7/} The EEO clauses mandated by each of the three laws require a contractor to take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to the relevant characteristic applicable under each law. See 41 C.F.R. §60-1.4(a)(1); 41 C.F.R. §60-250.5(a)(1); 41 C.F.R. §60-741.5(a)(1).

^{8/} Goya argues in its brief to the Board that the ALJ improperly excluded from evidence a Memorandum dated September 23, 1996, to the Department of Labor concerning the requested exemption. Given our resolution of the exemption issue, we need not decide whether the ALJ properly excluded the Memorandum from the record because its inclusion would not have changed our decision. Even if the exemption request had been pending at OFCCP at the time OFCCP filed the complaint, this fact would not alter our determination that Goya did not establish that OFCCP's failure to respond to the exemption request precluded it from filing the administrative complaint. See discussion *supra* at 3.

agency and the contractor is written.” 41 C.F.R. §60-1.4(e); §250-1.5(e); §741-1.5(e). Of course, the BPAs explicitly incorporated by reference the equal opportunity and affirmative action requirements of each of the three laws. See P (Plaintiff’s Exhibit) 5, p. 35, and P6, p. 37.

In addition, in a case involving very similar issues, the Secretary held that a BPA “is an enforceable bilateral option contract in which the consideration is the mutual promises exchanged . . . ” and “is ‘a contract’ within the meaning of 41 CFR 60-1.40(a)(1) and 60-2.1(a)(1) [sic].” *OFCCP v. Star Machinery Co.*, No. 83-OFCCP-4, slip op. at 5 (Sec’y Sept. 21, 1983), and cases cited therein. See also *OFCCP v. Bruce Church*, No. 87-OFC-7, slip op. at 3-4 (Sec’y June 30, 1987).

Finally, Goya itself apparently recognized that the BAPs were contracts when it wrote to DeCA on August 2, 1996, “to request and obtain an exemption from the applicability of the Affirmative Action Programs clause from our **contract**.” (emphasis supplied). D6.

C. The ALJ Did Not Have Authority to Rule on Goya’s Arguments that the Contract Disputes Act Supersedes the Procedures in 41 C.F.R. Chapter 60.

Goya asserts that the procedures for resolution of disputes between the government and government contractors provided for in the Contract Disputes Act supersede the enforcement procedures in the regulations. See 41 C.F.R. Chapter 60, Part 60-1, Subpart B; Part 60-250, Subpart D; Part 60-741, Subpart D. While discussing at length the background and legislative history of the Contract Disputes Act, Goya does not address specific provisions in Department of Labor regulations and in the Federal Acquisition Regulations which apply to disputes such as this, notwithstanding the existence of a contract disputes clause in the contract. See 41 C.F.R. §60-1.1; 48 C.F.R. §52.222-26(c); 48 C.F.R. §52.222-35(g); 48 C.F.R. §52.222-36(a)(1)(2).

Furthermore, we agree with the ALJ that an agency is bound by its own regulations, and an agency head acting in an adjudicatory capacity has no authority to review the validity of those regulations. *United States v. Nixon*, 418 U.S. 683, 695-696 (1974). (“So long as the regulation is extant it has the force of law.”). Cf. *Stouffer Foods Corp. v. Dole*, No. 7:89-2149-3, 1990 WL 58502, * 1 (D. S. C. Jan. 23, 1990) (“Defendant’s [Department of Labor] administrative law judges are bound by Executive Order 11246 and its implementing regulations; they have no jurisdiction to pass on their validity. *Oestereich v. Selective Service System*, 393 U.S. 233, 241-242, (1968); *Bituminous Coal Operators Ass’n, Inc. v. Secretary of Interior*, 547 F.2d 240, 244 (4th Cir.1977).”) *Accord* Secretary’s Order 02-96 (April 17, 1996) (“The [ARB] shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations which has been duly promulgated by the Department of Labor and shall observe the provisions thereof where pertinent, in its decisions.”).^{2/}

^{2/} We express no opinion on the ALJ’s conclusion that the remedies of contract cancellation and debarment are “penalties” and thus exempt from the operation of the Contract Disputes Act by its own terms. 41 U.S.C. §605(a).

CONCLUSION AND ORDER OF DEBARMENT

For the reasons discussed in this decision, Goya's exceptions to the R. D. & O. are **DENIED**. Accordingly, it is **ORDERED** that defendant Goya de Puerto Rico, Inc., its officers, agents, employees, successors, divisions, subsidiaries, and all persons in active concert or participation with them are permanently enjoined from failing or refusing to comply with the requirements of Executive Order No. 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Section 503 of the Rehabilitation Act of 1973 and their implementing regulations (41 C.F.R. Parts 60-1 to 60-60, 41 C.F.R. Part 60-250, and 41 C.F.R. Part 60-741). It is further **ORDERED** that: (1) All Goya's existing government contracts, subcontracts, and blanket purchase agreements, and all of the contracts, subcontracts, and all blanket purchase agreements of Goya's officers, agents, employees, successors, divisions, subsidiaries, and all persons in active concert or participation with it, are herewith canceled and terminated; (2) Goya is herewith debarred from having or entering into government contracts until the later of the expiration of six months or the fulfillment of the following three conditions, (a) - (c), --(a) Goya submits a complete affirmative action program to OFCCP;(b) OFCCP has the opportunity to complete an on-site investigation and to conduct a full compliance review to confirm the accuracy of the affirmative action program and to verify compliance with all regulations; and (c) the Secretary of Labor, through OFCCP, declares Goya's affirmative action program acceptable; and finally (3) Goya, its officers, agents, employees, successors, divisions, subsidiaries, and all persons in active concert or participation with Goya are herewith declared ineligible for the award of any future governments contracts, subcontracts or blanket purchase agreements, and for the extension or modification of any existing government contract, subcontract or blanket purchase agreement, until section (2)(c) above is met, and until such time as Goya satisfies the Deputy Assistant Secretary for Federal Contract Compliance Programs that it is in compliance with the provisions of the Executive Order, VEVRAA, Section 503 and the implementing regulations for each.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge